Interstate Warehousing of Ohio, LLC *and* Warehouse, Production and Maintenance Employees and Furniture, Piano, Express Drivers and Helpers Local Union 661, affiliated with the International Brotherhood of Teamsters, AFL–CIO. Case 9–RC–17485

March 27, 2001

ORDER DENYING REVIEW

BY CHAIRMAN TRUESDALE AND MEMBERS WALSH AND HURTGEN

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions of which are attached).[1] The Employer's request for review of the Regional Director's Decision and Direction of Election raises a substantial issue solely with regard to the Regional Director's exclusion of the transportation trainee from the unit. The Board concludes, however, that this issue can best be resolved through use of the challenge procedure.

The Employer is engaged in warehousing frozen food at its facility in Hamilton, Ohio. The Petitioner seeks to represent a unit of warehouse employees, including employees supplied by temporary employment agencies (temporary employees). In its petition, the Petitioner named and seeks to bargain with the Employer and not the temporary agencies. The Employer agreed that its solely-employed warehouse (permanent) employees should be included in the unit. The Employer argued that it is not an employer of the temporary employees but that, assuming it is, then the jointly-employed temporary employees should be excluded from the unit. The Regional Director found that the Employer is a statutory employer of the temporary employees and that a unit of the Employer's permanent employees and the jointly-employed temporary employees is an appropriate unit.[2]

In denying review of the Regional Director's unit finding, we agree with the Regional Director that the petitioned-for unit of the Employer's solely-employed permanent employees and its jointly-employed temporary employees is appropriate. Specifically, we agree with the Regional Director that the temporary employees share a sufficient community of interest with the Employer's permanent employees to be included in the same unit. The temporary employees work side-by-side and are largely interchangeable with the permanent employees. The temporary employees share the same job classifications as the Employer's permanent employees, perform common work functions, and share common work hours and supervision. The duration of their employment is indefinite. Further, the Employer does not dispute that since January 1, 2000, it has obtained all of its permanent employees by hiring from its temporary employees. Hence, the temporary employees are akin to probationary employees whom the Board includes in units with employees with more permanent tenure. *Johnson's Auto Spring Service*, 221 NLRB 809 (1975). Based on these uncontradicted community-of-interest indicia, we agree with the Regional Director that the unit sought by the Petitioner constitutes an appropriate unit.

Our colleague's prediction of "bargaining difficulties" from this unit mistakenly equates issues of bargaining with the appropriateness of the unit. His argument is not over the community of interest shared by the employees in this unit, but rather that all terms and conditions of employment for all unit employees may not be capable of resolution at the bargaining table. The issue of the extent of the Employer's bargaining obligations, however, is not currently before us. See, e.g., *Boston Medical Center Corp.*, 330 NLRB 152 (1999); *M.B. Sturgis*, 331 NLRB No. 173, slip op. at 9–10 (2000).[3]

In addition, the specific concerns raised by our colleague have been addressed in recent Board decisions. He expresses doubts as to whether the permanent and temporary employees share a community of interest because the supplier employers set economic terms and conditions of employment for the temporary employees whereas the Employer sets the economic terms and conditions of employment for the permanent employees. In *Sturgis*, however, the Board found that a unit that included a user employer's jointly-employed employees with its solely-employed employees could be appropriate under a community of interest analysis, even though economic terms were determined by the supplier em-

[1] The issues presented for review are whether the Regional Director erred in finding: (1) the Petitioner, not Teamsters Local 100, is attempting to represent the petitioned-for employees; (2) the Employer is a statutory employer of the temporary employees; (3) temporary employees may be included in the same unit with the Employer's permanent employees; and (4) the transportation trainee should be excluded from the unit.

[2] The Regional Director also included several classifications of warehouse clericals and maintenance employees that the Employer contended must be included, except for the transportation trainee.

[3] Cf. *Management Training Corp.*, 317 NLRB 1355, 1358–1359 (1995), in which we declined to be drawn into the issue of bargaining in a representation case, explaining that "[b]ecause of commercial relationships with other parties, an inability to pay due to financial constraints, and competitive considerations which circumscribe the ability of the employer to grant particular demands, the fact is that employers are frequently confronted with demands concerning matters which they cannot control as a practical matter or because they have made a contractual relationship with private parties or public entities."

ployer.[4] Id., slip op. at 11. In addition, the community of interest factors relied on by the Regional Director here were cited by the Board in *Sturgis*, above, slip op. at 10-11, as supporting inclusion of jointly-employed temporary employees in the same unit with solely-employed employees.[5]

Further, the Petitioner's failure to name the supplier employers in the petition has no bearing on the issue of whether the solely-employed employees and the jointly-employed employees share a community of interest. Rather, the Petitioner's decision to name in the petition and seek to bargain only with the Employer relates solely to the extent of the Employer's bargaining obligation if the Petitioner is certified. As the Board has made clear in recent cases, the absence of one of the joint employers at the bargaining table does not destroy the ability of the named employer to engage in effective bargaining with its employees to the extent that it controls their terms and conditions of employment. See *Professional Facilities Management*, 332 NLRB No. 40 (2000) (naming only user employer),[6] and *Sturgis*, above, slip op. at 11–12 (naming only supplier employer). Hence, the failure of the Petitioner to name the supplier employers does not affect the employees' community of interest or destroy the appropriateness of an otherwise appropriate unit.[7]

Accordingly, the Regional Director's decision is amended to permit the transportation trainee to vote under challenge, and the Employer's request for review is denied in this and all other respects.

MEMBER HURTGEN, dissenting in part.

I would grant review.

The Employer employs its own employees (regular employees) and also employs temporary employees supplied to it by CBS Personnel Services and, to a lesser degree, three other temporary employment agencies. The Employer and the temporary employment agencies are joint employers of the temporary employees. The Petitioner seeks to represent, in one unit, the Employer's own employees and the temporary employees. However, it seeks to bargain only with the Employer named in the petition.

I have substantial doubts as to whether the two groups share a community of interests. Where, as here, the suppliers (e.g., CBS) set the economic conditions of the temporary employees, and the user (Employer) sets the economic conditions of the regular employees, I have grave questions as to whether the two groups share a community of interests.[1] In addition, as noted below, the bargaining for the temporary employees is necessarily limited (because the supplier employers are not named), while the bargaining for the regular employees is not so limited. In my view, this factor is an element which militates against a finding that the two groups would share a common interest in the bargaining.

Contrary to the suggestion of my colleagues, *Sturgis* did not decide the issue raised herein. In *M.B. Sturgis*, 331 NLRB No. 173 (2002), the issue was whether there was a *prohibition* against combining jointly-employed employees and singly-employed employees in the same unit, absent the consent of both employers. The Board held that there was no such prohibition. The Board did *not* decide (and indeed remanded) the issue of whether it was *appropriate* to combine the two groups of employees.[2]

My colleagues also assert that the temporary employees involved herein often became permanent employees, and thus should be treated as probationary employees and included in the unit. The argument misses the mark. The temporary employees herein are jointly employed by the Employer and others. The permanent employees are employed solely by the Employer. By contrast, in the probationary employee situation, the probationary employees are employed solely by the employer who employs the permanent employees.

In addition, a unit of temporary and regular employees poses substantial bargaining difficulties. As noted

[4] As in this case, the supplier employer in *Sturgis*, Interim, Inc., determined the wages and benefits of the jointly-employed temporary employees that it supplied to M.B. Sturgis. The board remanded the case to determine if the jointly-employed employees must be included in the unit with Sturgis' solely-employed employees. Slip op. at 12.

[5] The Board stated that the record in *M.B. Sturgis* contained facts "that could support including the Interim-supplied" employees in the same unit with user M.B. Sturgis' employees. Id. at 11. In *M.B. Sturgis*, as here, the temporaries worked side-by-side with the regular employees, performed the same work, were subject to the same supervision, and worked the same hours. Id. at fn. 19. In addition, like the temporaries in *M.B. Sturgis*, the temporaries received different wages and benefits from permanent employees. Ibid.

[6] We agree with our colleague that the petitioned-for unit in *Professional Facilities Management* did not involve including solely-employed employees with jointly-employed employees and thus did not present the community of interest question presented here. The Board's decision in that case, however, is relevant in answer to our colleague's concern that the Petitioner's failure to name the supplier employers "poses substantial bargaining difficulties."

[7] The warehouse-type unit involved here clearly is one that the Board traditionally finds to be an appropriate unit. See, e.g., *Overnite Transportation Co*., 331 NLRB No. 85 (2000).

[1] See my concurring opinion in *J.E. Higgins*, 332 NLRB No. 109 (2000).

[2] The Board in *M.B. Sturgis*, said that the record contained "at least some facts that could support" the inclusion of the jointly-employed employees with the singly-employed employees. This is a far cry from a definitive holding that the two the groups *would* constitute an appropriate unit.

above, the Union seeks bargaining only with the Employer. Thus, in bargaining, the parties would deal with all of the terms and conditions of employment as to the regular employees, but would deal with only limited terms and conditions of employment as to the temporary employees. The bargaining would therefore be bifurcated. A number of problems arise. For example, if agreement is reached as to either group, it would appear that the agreement could not be implemented, for that is only part of the unit. Similarly, if impasse is reached as to either group, it would appear that there could be no implementation, for there would be an impasse in only part of the unit.

The majority argues that I have confused issues of bargaining with issues of appropriateness of unit. In my view, they have set up a false dichotomy. The essential reason for requiring a "community of interest" among unit employees is to protect against the prospect that bargaining will be frustrated by significant fractures within the bargaining unit.[3]

My colleagues fail to address the issues set forth above. I would do so by a grant of review.[4]

APPENDIX

DECISION AND DIRECTION OF ELECTION

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Employer objected to the hearing officer's proceeding with the hearing. Specifically, the Employer states that until December 7, 2000, the day before the hearing commenced, it had not been informed that the Petitioner sought to include temporary employees in the unit.[1] The Employer asserts that it did not have an opportunity to prepare to litigate community of interest and joint employer issues relating to the temporary employees. The Employer argues that the hearing should not have proceeded because the temporary agencies had not been notified of, and were not participating in, the hearing and that the petition should be amended to name the temporary agencies as employers. The Petitioner stated at the hearing that it was seeking to bargain only with the Employer and that it was not seeking to bargain with any of the temporary agencies.

The hearing began on December 8 and concluded on December 11, 2000. On December 11, 2000, the Employer adduced testimony bearing on its relationship to the temporary employees and their community of interest with its permanent employees. Under these circumstances, I find that the Employer clearly had knowledge of the temporary employees, prior to the filing of the petition, and should have been aware that the Petitioner might be seeking to represent them, and further had ample opportunity from December 7 to December 11, 2000 to prepare for litigation of those issues. Moreover, the Petitioner seeks only to bargain with the Employer and not the temporary agencies. Under such circumstances, the issues relating to the Employer's relationship to the temporary agencies, their joint employer status and the due process argument, revolving around the lack of notice to and nonparticipation of the temporary agencies have been found by the Board not to be relevant. *Professional Facilities Management, Inc.*, 332 NLRB No. 40 (2000). See also *M.B. Sturgis, Inc.*, supra.[2] Accordingly, the hearing officer correctly overruled the Employer's objection to proceed with the hearing and his ruling is hereby affirmed.[3]

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. At the hearing, the Employer raised an issue concerning the identity of the labor organization seeking to represent the employees. The Employer's concern appears to be based on the fact that the Petitioner received uncompensated assistance from a sister local, Teamsters Local 100, in the form of the services of a Local 100 organizer. The record shows that the Petitioner currently represents approximately 520 employees employed by seven different employers and that if it becomes the representative of the employees in the unit sought in the instant petition, it will utilize its own resources to negotiate and administer any collective-bargaining agreement entered into with the Employer. Accordingly, I am satisfied that it is the Petitioner, and not Local 100, which is attempting to represent the employees sought in the petition.

In its brief, the Employer characterizes *United Truck & Bus Service Co.*, 257 NLRB 343 fn. 3 (1981), as suggesting that it is improper for a petitioning labor organization to lead employees to believe that a labor organization would be their representative while maintaining a secret plan to substitute another existing labor organization as their representative. However, in that

[3] *Management Training Corp.*, 317 NLRB 1355 (1995), cited by the majority, deals with the entirely different issue of whether the Board should assert jurisdiction over Government contractors in circumstances where employment conditions are set in substantial part by the Government.

[4] *Professional Facilities Management*, 322 NLRB No. 40 (2000), is distinguishable. In that case, the entire unit consisted of the jointly-employed employees.

[1] Employees supplied to the Employer by temporary employment agencies.

[2] The Employer, in its brief, asserts that I should not follow the Board's decisions in *M.B. Sturgis* and *Professional Facilities Management* because those decisions failed to provide a reasoned interpretation of the Act. Having carefully considered the Employer's arguments, I conclude that there is no compelling reason for me to depart from these controlling precedents and I decline to do so. Indeed, I am obligated to follow controlling Board precedent. See *Lentz Co.*, 153 NLRB 1399 (1965); *Club Cal-Neva*, 231 NLRB 22 (1977).

[3] By letter dated December 11, 2000, CBS Personnel Services, a temporary agency which supplies employees to the Employer, requested a postponement of the hearing. Because CBS is not an employer with whom the Petitioner is seeking to bargain, under the rationale of *Professional Facilities Management*, it is not a party with an interest in this proceeding and is not entitled as a matter of right to participate. Accordingly, CBS's request for a postponement is hereby denied.

case, unlike the situation here, the labor organizations involved admitted that such a substitution was secretly planned. In the instant matter, the evidence shows that if the Petitioner is certified, it will, in fact, be the representative of the employees in the unit. The petition in *United Truck* was dismissed on the basis that the petitioning union was not a labor organization within the meaning of Section 2(5) of the Act. Here, the parties stipulated that the Petitioner is a labor organization within the meaning of that section.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer is engaged in warehousing frozen food[4] at its facility in Hamilton, Ohio, the only facility involved in this proceeding, where it employs approximately 87 employees, including about 76 in the unit found appropriate. There is no history of collective bargaining among any of the employees at the Hamilton facility.

The Petitioner seeks to represent a unit of approximately 59 warehouse workers,[5] including lead persons and employees supplied to the Employer by temporary employment agencies, also referred to as temporary employees. The Employer agrees that its solely employed (permanent as opposed to temporary) warehouse workers and lead persons should be included in any unit found appropriate. However, contrary to the Petitioner, the Employer maintains that the appropriate unit must also include maintenance employees, shipping and receiving clerks, inventory employees, customer service representatives, the transport clerk, the transport trainee, the case pick replenish clerk and the receptionist/case pick replenish clerk. Finally, the Employer maintains that it is not the Employer of the temporary employees and that they are properly excluded from the unit. The Employer currently uses about 23 temporary employees and all, except for 3 of them, are warehouse workers.[6] The Petitioner is willing to proceed to an election in any unit found appropriate.

For the reasons set forth below, I find that the unit sought by the Petitioner is not appropriate for purposes of collective bargaining and that the smallest appropriate unit encompassing the employees sought by the Petitioner must also include the warehouse clerical and maintenance employees. However, I agree with the Petitioner that the temporary employees may be included in the unit.

The Employer's Hamilton facility consists of a front office and a warehouse. The warehouse includes a dock area with about 64 truck doors and a freezer area where the product is actually stored. The temperature in the freezer is kept at or below 0 degrees Fahrenheit and the temperature on the dock is kept at about 30 or 40 degrees. Employees who work in the freezer wear freezer suits provided by the Employer.

The general manager, Paul Hanna, is the highest ranking employer official who works at the Hamilton facility and is in overall charge of the operations at that location. Belinda McIntyre, customer service manager; Brian Chreen, human resources manager; Christopher Cannon, transportation manager; and Richard Rogers, operations manager; all work in the front office and are immediately subordinate to Hanna. Chreen has no subordinates. McIntyre directly supervises two customer service representatives, the case pick replenish clerk and the receptionist/case pick replenish clerk whom the Employer, contrary to the Petitioner, would include in the unit. Cannon directly supervises the transportation clerk and the transportation trainee whom the Employer, contrary to the Petitioner, would also include in the unit. The employees under McIntyre and Cannon work from 8 a.m. to 4:30 p.m. in the front office. Rogers directly supervises shift supervisors, Darrell Croell, Mark Boswell, and Scott Mohrfield; Derrick Browning, inventory manager; and Eric Coleman, maintenance supervisor. The parties stipulated, the record reflects and I find that Hanna, McIntyre, Chreen, Cannon, Rogers, Croell, Boswell, Mohrfield, Browning, and Coleman are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude them from the unit.

Croell directly supervises 21 warehouse workers and 3 shipping and receiving clerks. Boswell directly supervises 20 warehouse workers and 2 shipping and receiving clerks. Mohrfield directly supervises 18 warehouse workers and 1 shipping and receiving clerk. The normal work hours of the employees under Croell, Boswell, and Mohrfield consist of 8.5-hour shifts beginning at 6 a.m., 2 and 10 p.m., respectively. Browning directly supervises three inventory employees, two of whom work from 6 a.m. to 2:30 p.m. and the third from 2 to 10:30 p.m. Coleman directly supervises three maintenance employees who work from 7 a.m. to 3:30 p.m. All of these supervisors and employees under Rogers work in the warehouse. The warehouse workers are not assigned to any particular area of the facility but perform varying amounts of their work in the freezer or the dock areas depending on their particular job assignment. The shipping and receiving clerks work primarily in the office located on the dock. The maintenance employees work primarily in the maintenance shop which is also located on the dock. The inventory employees spend time in the inventory office located on the dock as well as in the freezer where they count product. All employees work overtime from time to time. However, it appears that the warehouse employees are required to work more overtime than the inventory employees.

The freezer at the Employer's Hamilton facility has several thousand uniquely identified storage slots where pallets (skids) of product are stored. All incoming pallets are identified with a log tag, which is a sticker bearing an identifying number, which is placed on the product. The Employer uses a computerized inventory and product tracking system, the function of which is to match the log tag number for a pallet of product with the location number reflecting where the product is stored in the

[4] It appears that the Employer does not own the food that it warehouses but merely stores it for a fee on behalf of its customers.

[5] Although the parties differ in their use of the term "warehouse worker," the Petitioner seeks a unit limited to all of the employees whose primary job function is the physical movement of product within the Employer's facility. Both parties agree that this group of employees includes and is limited to loaders, stockers, replenishers, case pickers, off loaders and pallet pickers. For ease of reference the term "warehouse workers" refers to the unit sought by the Petitioner, but does not include all employees who actually work in the warehouse.

[6] The Employer utilizes the services of two temporary shipping and receiving clerks and one temporary maintenance employee.

freezer and to indicate the location of product as it is in the process of being prepared for shipping.

The warehouse workers, as previously noted, perform the physical movement of product around the warehouse facility. They use various types of forklift equipment to accomplish their tasks. With the exception of one lead person on each of the three shifts who enters information concerning products absent from their designated location, the warehouse workers do not perform any computer work.

The shipping and receiving clerks handle paperwork and computer data entry for inbound and outbound product at the dock. The shipping and receiving employees are the primary contact with truck drivers and handle the exchange and verification of paperwork between the drivers and the Employer. They are responsible for generating and distributing paperwork concerning incoming and outgoing product to warehouse supervision and workers reflecting the food products that are to be loaded or unloaded and receiving paperwork from such employees reflecting what was actually loaded or unloaded. The shipping and receiving clerks compare the two sets of paperwork and contact warehouse supervision to account for any discrepancies. Once discrepancies are eliminated, the shipping and receiving clerks enter the information into the computerized system.

The customer service representatives review customer orders on the computer to determine if sufficient product is in inventory to fill the order. If so, the customer service representative releases the order by placing it in pending status. Customer service representatives also deal with customers concerning overloaded shipments where product must be removed from an order, when ordered product is not in inventory, when customers change orders, when shipments are verified and when customers request that an order be placed on hold. All of these functions involve adjustments to the Employer's computer system so that proper inventory and order status information is reflected.

The case pick replenish clerk prints computerized reports for case picks, replenishing and fill pallet orders. These reports are used by the warehouse employees in assembling outbound product. An outbound pallet may contain product from several pallets stored in the freezer. The warehouse workers are responsible for moving palletized product from the freezer to the case pick line where they may be required to select product from several storage pallets for assembly on an outbound shipment pallet. It is noted that the Employer does not have its own trucks and drivers but ships product by common carrier or on trucks furnished by customers.

The receptionist/case pick replenish clerk performs receptionist duties, manning the telephone 3.5 days per week and performs case pick replenish clerk duties 1.5 days per week. During those 1.5 days, the other case pick replenish clerk performs the receptionist duties.

The transportation clerk receives telephone calls from common carriers and schedules appointments for deliveries to the Hamilton facility. At the end of the day, the transportation clerk prints a delivery appointment schedule for the following day and places it in the mail slots of warehouse supervisors. This schedule is used to plan the receiving work of the warehouse workers. The transportation clerk also schedules pickups for customers who provide their own freight transportation.

Inventory employees spend most of their time performing cycle counts which involves working in the freezer comparing a computerized list of the locations of pallets of product to their actual location in the freezer. Where the location shown in the computer does not reflect the actual location, the proper location is entered into the computer by the inventory employees. Inventory employees also reconcile damaged reports which are completed by warehouse workers upon damage to a product. However, because damage reports are not always completed, the inventory employees compare damage reports to actual damaged product and track down the source of damaged product and adjust inventory on the computer to appropriate levels. The inventory employees are also responsible for the physical counting of product in the freezer upon a customer request.

The maintenance crew consists of three employees. One maintenance employee, Ed Robertson, performs custodial duties and unskilled preventative maintenance work such as watering and changing batteries in forklift equipment. John Ringhauser, a maintenance B employee, assists the maintenance supervisor in repairing forklifts and making repairs to the building. In addition, Ringhauser changes light bulbs and works on freezer doors and racks. Finally, the third maintenance employee is a temporary employee who primarily repairs forklifts. There is no evidence that the maintenance employees repair or work on the refrigeration system or perform highly-skilled maintenance work.

The transportation trainee assists the transportation manager in receiving customer orders and entering the orders into the computer, scheduling and building outbound loads and occasional handling of billing disputes with common carriers. The transportation trainee confirms receipt of deliveries for outbound freight. Although the transportation trainee is not in any formal training program, the position is akin to an apprenticeship to the transportation manager with a goal of learning the trucking business and moving to a transportation supervisor position at another of the Employer's facilities within a year.

All three of the current inventory employees were warehouse workers immediately prior to occupying their current positions. An additional two warehouse workers transferred to inventory positions for periods of 3 and 6 months, respectively, before transferring back to warehouse worker positions. Inventory employees may be assigned to perform the functions of warehouse workers physically moving product in the event that they have insufficient inventory work but this apparently happens infrequently. Inventory employees and other warehouse workers rotate serving on Saturday skeleton crews receiving and physically moving product, but the record does not reflect how often a particular employee may be assigned to Saturday work. In September or October 1999, a warehouse worker was temporarily transferred to perform cycle counts for a total of 12 hours over 2 days because the inventory department was behind in its work. During the week prior to the hearing, a warehouse worker was temporarily transferred to inventory for 4 or 5 days performing damaged product work. In March 1999 and again about 2 weeks prior to the hearing, warehouse workers were assigned to assist inventory employees in performing a total

count of all product in inventory. This count requires about two 8-hour shifts and is performed at least annually. A maintenance employee transferred to his current position from a warehouse worker position. Finally, in March 2000, a shipping and receiving clerk permanently transferred to a warehouse worker position.

Warehouse workers have regular work-related contact with shipping and receiving clerks when they submit paperwork concerning the movement of products. Although less frequent, the warehouse employees have work-related contact with maintenance employees in providing information concerning the repair of equipment. Moreover, the warehouse employees work in the freezer at the same times as inventory employees but it appears they have little work-related contact. The warehouse employees have less work-related contact with the employees who perform their duties from locations in the front office area of the facility. Finally, it is noted that the warehouse and inventory employees are the only ones who wear freezer suits.

All the Employer's permanent employees receive the same benefits and are subject to the same work rules and personnel policies. The wages of the warehouse workers, maintenance and inventory employees range from $11 to $15. The wages of the shipping and receiving clerks, customer service representatives, the transport clerk and the case pick replenish clerk range from $9.50 to $15. The wage range for the receptionist/case pick replenish clerk is $9 to $13. Finally, the transportation trainee earns $500 a week.

The Employer obtains temporary employees from one of four temporary employment agencies. Most of the temporary employees are supplied by CBS Personnel Services. The temporary employees are hired and referred to the Employer by the temporary agencies who carry the temporary employees on their payrolls. The Employer pays an hourly rate to the temporary agencies for the use of the temporary employees whose actual wage rates are determined by the temporary agencies. The Employer supervises the work of the temporary employees, disciplines them and may terminate their services for the Employer.[7] Indeed, the Employer rejected the services of a temporary employee who was intoxicated when he first appeared at the warehouse to work. Temporary employees do not receive any of the benefits that the Employer provides its permanent employees. The temporary employees work along side of the permanent employees performing the same job functions under the same supervision. Temporary employees may convert to permanent (solely employed) employees of the Employer after serving 90 days in temporary status. The conversion from temporary to permanent status appears to occur for most temporary employees upon completion of 90 days after which they receive a wage increase and become eligible for the benefits that the Employer provides to its permanent employees. Two warehouse workers testified that when they first began working at the Employer's facility as temporary employees they were told by the temporary agencies that they could convert to permanent status after 90 days. Upon such conversion, they received a 50-cent-per-hour wage increase.

During the year prior to the hearing, there were 158 temporary employees referred for work at the Employer's Hamilton facility. The record discloses that 70 left within a month, 18 left within 2 months, 8 left within 3 months, 9 were not offered full-time employment by the Employer, and 22 were offered permanent positions with the Employer. Since at least January 1, 2000, the Employer has not hired any permanent employees who were not previously temporary employees. Although the Employer may request of the temporary agencies that the services of temporary employees be terminated, it appears that the high degree of turnover among them is due to their having voluntarily left their employment at the Employer's Hamilton facility.

Analysis

Section 9(a) of the Act only requires that a unit sought by a petitioning labor organization be an appropriate unit for purposes of collective bargaining, and there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit or even the most appropriate unit. *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950). Moreover, the unit sought by the petitioning labor organization is always a relevant consideration and a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to that requested does not exist. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Purity Food Stores*, 160 NLRB 651 (1966). For example, in *Overnite*, the Board found that the inclusion of mechanics in a unit of drivers and dock workers was not required because the mechanics had a sufficiently distinct community of interest from the drivers and dock workers to enable them to be represented in a separate appropriate unit. *Overnite Transportation Co.*, 322 NLRB at 726. Therefore, to determine whether the unit sought by the Petitioner is an appropriate unit, I must consider whether the employees the Petitioner seeks to exclude could appropriately enjoy separate representation.

The appropriateness of a given unit is governed by community of interest principles. In analyzing community of interest among employee groups, the Board considers bargaining history; functional integration; employee interchange and contact; similarity of skills, qualifications and work performed; common supervision; and similarity in wages, hours, benefits and other terms and conditions of employment. *Armco, Inc.*, 271 NLRB 350 (1984); *Atlanta Hilton & Towers*, 273 NLRB 87, 89 (1984); *J.C. Penney Co.*, 328 NLRB 766 (1999). Here, there is no history of collective bargaining affecting any of the employees to provide guidance with respect to their unit placement.

Temporary Employees

The Employer, as previously noted, controls the employment tenure of the temporary employees at its premises to the extent that it may reject employees referred by temporary agencies and may have their services terminated for cause after they

[7] When the Employer terminates the services of a temporary employee, it notifies the temporary agency who then notifies the employee. Although Hanna testified that the Employer does not discipline temporary employees, he testified that it offers them guidance by writing their mistakes down and discussing them with the temporary employee and that sometimes the mistakes are written on a form that the Employer uses for verbal and written warnings given to its permanent employees.

begin work on behalf of the Employer. The Employer supervises, directs and disciplines the temporary employees assigned to the Employer's facility. In addition, a significant number of temporary employees are converted to permanent employees of the Employer after completing a probationary period. Under such circumstances, the Employer is a statutory employer of the temporary employees and the Petitioner may bargain with the Employer concerning them in the unit found appropriate to the extent that the Employer controls their terms and conditions of employment. *Professional Facilities Management*, supra. See also, *M.B. Sturgis, Inc.*, supra. The fact that the supplier employers (temporary agencies) as are not named in the petition is not relevant nor is it relevant whether the Employer is a joint employer with the supplier employers. *Professional Facilities Management*, supra.

The temporary employees share common work functions, hours and supervision with the Employer's permanent employees while working side by side with them. Such circumstances demonstrate a high degree of functional integration, interchangeability and work-related contact between the temporary and permanent employees. These community of interest factors when considered in conjunction with the temporary employees' expectation of conversion to permanent employees of the Employer are sufficient to permit the temporary employees to be appropriately represented in a unit together with the Employer's permanent employees.

Indeed, the record discloses that most of the temporary employees who complete 90 days of employment with the Employer are offered permanent status. Their status as temporary employees is therefore analogous to the status of trainees or probationary employees with a reasonable expectation of permanent employment in a bargaining unit. In *Johnson's Auto Spring Service*, 221 NLRB 809 (1975), and *National Torch Tip Co.*, 107 NLRB 1271 (1954), the Board held that the exclusion of such employees from a bargaining unit in which they enjoy a reasonable expectation of permanent employment is unwarranted and they should be eligible to vote in representation elections conducted in such units. In *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84, 87 (1989), and *Rhode Island Hospital*, 313 NLRB 343 fn. 3 (1993), the Board included employees designated as temporary in bargaining units on the basis that their status was analogous to that of probationary employees. In *Johnson's Auto*, the Board included trainees in a bargaining unit despite the fact that they were subject to a 90-day probationary period during which they received a wage rate substantially less than unit employees, did not receive the fringe benefits enjoyed by unit employees and only 1 of 13 trainees converted to permanent status upon completion of the 90-day probationary period. In *Johnson's Auto* and *National Torch Tip*, the Board held that probationary employees' expectation of permanent employment in a bargaining unit should not turn on the proportion of them completing their probationary period.

Based on the foregoing, the entire record and after careful consideration of the arguments of the parties at the hearing and in their briefs, I find that the temporary employees may be represented in the same unit as the Employer's permanent employees. Accordingly, I shall include the temporary employees in the unit.

Warehouse Clerical Employees [8]

The Board has consistently held that warehouse clerical employees should be included in units of warehouse employees where their functions are integral to the functioning of the warehouse operations. *Fleming Foods, Inc.*, 313 NLRB 948, 949 (1994), citing *John N. Hansen Co.*, 293 NLRB 63, 65 (1989). In *Fleming Foods*, the Board found that because the warehouse clericals performed functions integral to the warehouse operation, they did not constitute an appropriate unit separate from the employer's other warehouse employees and that they were residual to the existing represented unit. The functions of the shipping and receiving clerks and inventory employees here are analogous to the duties of the dispatch, receiving and inventory clericals in *Fleming*. In *Hansen,* the clerical found to be performing duties integral to the warehousing operation initiated the workflow for warehouse employees in a manner similar to the transportation clerk and the customer service representatives here and prepared picking tickets, a function similar to that performed by the Employer's case pick replenish clerks. The Employer's warehouse clericals, like those in *Fleming* and *Hansen,* all perform duties relating to the gathering, recording and distribution of information and records concerning the movement of product throughout the Employer's warehouse operation which are used by warehouse workers in the performance of their duties. The work of the Employer's warehouse clericals is functionally integrated with the work of its warehouse employees to the same extent that the work of the warehouse clericals in *Fleming* and *Hansen* was functionally integrated with that of the warehouse employees in those cases. It is apparent from the Board's decisions in *Fleming* and *Hansen* that functional integration is a highly significant factor in determining the extent to which warehouse clericals share a community of interest with warehouse employees.

The work of the warehouse clericals is not only functionally integrated with the work of the warehouse employees but all employees share the same benefits, are subject to the same personnel policies and work similar hours. The wage rates for the warehouse workers are the same as the inventory employees and are similar to those of the other warehouse clerical employees. Moreover, I note that the warehouse employees and the shipping and receiving clerks share common supervision. Likewise, the evidence of permanent and temporary transfers involving warehouse workers and inventory employees demonstrates interchange between the two groups of employees. The work of the warehouse employees in physically moving product is distinct but functionally integrated with the work of the warehouse clericals who gather, record and disseminate information and records concerning that movement.

[8] In its brief, the Petitioner alludes to these employees as being office clerical employees. However, for the reasons set forth below, the evidence shows that they perform functions which are an integral part of the Employer's warehousing operations and are warehouse clericals rather than office clerical employees. Indeed, except for the receptionist duties shared by the two replenish clerks, there is no evidence that those employees perform any typical office clerical functions.

In view of the foregoing, particularly noting the functional integration of the work of the warehouse workers and the warehouse clericals, I find that both groups of employees share such a strong community of interest that neither group could constitute a separate appropriate unit. *Fleming Foods*, supra; *John Hansen Co.*, supra. Inasmuch as the warehouse clerical employees may not constitute a separate appropriate unit, their inclusion in the same unit with the warehouse workers is required. *Overnite Transportation Co.,* 322 NLRB at 726. Accordingly, I shall include the warehouse clericals in the unit with the warehouse workers.

It appears that the case pick replenish clerks are dual function employees as they each spend some portion of their work week performing receptionist (office clerical) duties. However, dual function employees are appropriately included in units where they regularly spend a substantial amount of their time performing unit work, even in circumstances where the performance of unit work is less than a majority of their duties. *Avco Corp.*, 308 NLRB 1045 (1992). The evidence here establishes that both of the case pick replenish clerks regularly spend a substantial portion of their time performing (warehouse clerical) unit work. Accordingly, I shall include them in the unit.

Maintenance Employees

The maintenance employees have the same wages, benefits, personnel policies and working hours as other employees in the unit. They have work-related contact with the warehouse employees when they discuss the repair of forklift equipment. In addition, a current maintenance employee is a former warehouse worker. Moreover, the record reflects that the maintenance employees perform unskilled maintenance work. Thus, the maintenance employees share a community of interest with the other employees in the unit.

I note that the maintenance employees' work is not directly related but is only supportive to the movement of product around the Employer's facility. In addition, the maintenance employees have their own supervisor. The separateness of this supervision is mitigated, however, by the fact that Paul Hanna, the general manager, is the lowest ranking supervisor common to the other employees in the unit and Hanna supervises the maintenance employees at the same level as the other unit employees.

Having examined the community of interest that the maintenance employees share with the other unit employees, I am of the opinion that it is so substantial that the maintenance employees may not appropriately enjoy separate representation. Under such circumstances, I conclude that the maintenance employees must be included in the same unit with the other unit employees.

Precedents relied upon by the Petitioner in its brief are distinguishable. In *Laidlaw Waste Systems v. NLRB*, 934 F.2d 898 (7th Cir. 1991), the court noted that the Board relied significantly on differences in pay when it excluded mechanics from a truck drivers' unit. Here, the maintenance employees have the same wage range as other employees in the unit. In *Solid Waste Services, Inc.*, 313 NLRB 385 (1993), the mechanics who were excluded from a drivers unit were employed solely by an employer found not to be a joint employer with the employer of the bargaining unit employees. Here, the maintenance employees are employed by the Employer and share a substantial community of interest with the other unit employees. In *Fletcher Jones Chevrolet*, 300 NLRB 875 (1990), and *Dodge City of Wauwatosa*, 282 NLRB 459 (1986), separate craft units of automobile mechanics, excluding other service department employees, at automobile dealerships were found to be appropriate. There is no contention or evidence that the Employer's maintenance employees possess craft status. In *Mc-Mor-Han Trucking Co.*, 166 NLRB 700 (1967), the Board excluded mechanics from a unit of over-the-road truck drivers where the drivers worked irregular hours away from the employer's terminal and the mechanics worked regular hours at the terminal and there were substantial differences in the basis and amount of pay between the two groups. Here, the mechanics work similar hours earning similar wages at the same location as other employees in the unit. In *Kevah Konner, Inc.*, 256 NLRB 67 (1981), the administrative law judge, in an unfair labor practice proceeding, excluded bus drivers from a unit of service department employees on the basis that the bus drivers were part-time employees with minimal contact with service department employees. In the instant matter, the maintenance employees as well as the other employees in the unit work full time.

None of the precedents relied upon by the Petitioner involve the issue presented here as to whether the inclusion of maintenance employees in a warehouse unit is required. I note that in *Fleming Foods*, supra, the Board required the inclusion of maintenance employees in the residual unit with warehouse clerical employees having found that the warehouse clericals did not constitute an appropriate unit separate from the existing represented unit of warehouse employees. Implicit in the Board's *Fleming* decision requiring the inclusion of maintenance employees in the residual unit is the notion that the maintenance employees could not constitute a separate appropriate unit.

Based on the foregoing, the entire record and careful consideration of the arguments of the parties at the hearing and in their briefs, I find that the maintenance employees must be included in the same unit with the warehouse workers and warehouse clericals. Accordingly, I shall include the maintenance employees in the unit.

Transportation Trainee

The record reflects that the purpose of the transportation trainee position is to prepare the incumbent for a management position at another of the Employer's facilities. Thus, the transportation trainee's work is primarily focused on assisting the transportation manager so that the trainee may learn the trucking business. It appears that the only independent function of the transportation trainee is to verify deliveries of outbound product, a function unrelated to the movement of product at the Employer's warehouse. Where, as here, a management trainee's primary function is to gain sufficient knowledge to move to a management position, they lack a sufficient community of interest with other employees to warrant their inclusion in a bargaining unit. *May Department Stores*, 175 NLRB 514, 517 (1969); *Nationsway Transport Service*, 316 NLRB 4, 5

(1995). Accordingly, I shall exclude the transportation trainee from the unit.

In its brief, the Employer maintains that the transportation trainee is a warehouse clerical employee. The evidence concerning the duties of the transportation trainee is insufficient to enable me to determine whether they are primarily clerical in nature. In any event, it is undisputed that the transportation trainee is being trained for a supervisory position at another terminal and as I have excluded the position from the unit on that basis, I need not decide whether the position involves primarily clerical duties.

Appropriate Unit

Based on the foregoing, the record as a whole and careful consideration of the arguments of the parties at the hearing and in their briefs, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining:

> All warehouse and maintenance employees, including employees supplied by temporary employment agencies, shipping and receiving clerks, case pick replenish clerks, the transportation clerk and inventory employees employed by the Employer at its 110 Distribution Drive, Hamilton, Ohio facility, excluding the transportation trainee, office clerical employees and all professional employees, guards and supervisors as defined in the Act.

Accordingly, I shall direct an election among the employees in such unit.